

ILLINOIS REGISTER
DEPARTMENT OF REVENUE
NOTICE OF PROPOSED AMENDMENTS

- 1) Heading of the Part: Municipal Motor Fuel Tax
- 2) Code Citation: 86 Ill. Adm. Code 696
- 3)

<u>Section Numbers:</u>	<u>Proposed Actions:</u>
696.101	New Section
696.105	New Section
696.110	New Section
696.115	New Section
696.120	New Section
696.125	New Section
696.130	New Section
- 4) Statutory Authority: 65 ILCS 5/11-8-11-2.3
- 5) A Complete Description of the Subjects and Issues Involved: Implements the provisions of PA 101-604 which authorizes municipalities in Cook County to impose, beginning on July 1, 2020, a tax upon all persons engaged in the municipality in the business of selling motor fuel at retail at a rate not to exceed \$0.03 per gallon.
- 6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None
- 7) Will this proposed rulemaking replace an emergency rule currently in effect? No
- 8) Does this rulemaking contain an automatic repeal date? No
- 9) Does this proposed rulemaking (repealer) contain incorporations by reference? No
- 10) Are there any other proposed rulemakings pending on this Part? No
- 11) Statement of Statewide Policy Objectives: These rules do not create or enlarge a mandate as described in Section 3(b) of the State Mandates Act.
- 12) Time, Place, and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to submit comments on this proposed rulemaking may submit them in writing by no later than 45 days after publication of this Notice to:

Samuel J. Moore
Illinois Department of Revenue
Legal Services Office
101 West Jefferson
Springfield, Illinois 62794

(217) 782-2844

13) Initial Regulatory Flexibility Analysis:

- A) Types of small businesses, small municipalities and not for profit corporations affected: None directly. If a municipality imposes or increase its motor fuel tax under the authority of the Municipal Motor Fuel Tax Law, motor fuel retailers, including those that are small businesses, and purchasers of motor fuel in the municipality, including small businesses and not for profit corporations, would be subject to the tax.
- B) Reporting, bookkeeping or other procedures required for compliance: Municipal Motor Fuel Tax returns would be required to be filed by motor fuel retailers in the municipality who are small businesses.
- C) Types of professional skills necessary for compliance: None

14) Small Business Impact Analysis:

- A) Types of businesses subject to the proposed rule: Those businesses impacted by the rulemaking are small businesses that sell motor fuel at retail in counties that impose a County Motor Fuel Tax.

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- B) Categories that the agency reasonably believes the rulemaking will impact, including:
 - i. record keeping;

15) Regulatory Agenda on which this rulemaking was summarized: January 2020.

The full text of the Proposed Rules begins on the next page:

Section 696.101 Nature of the Municipal Motor Fuel Tax (Cook County)

- a) **Authority to Impose Tax**
Under the Municipal Motor Fuel Tax Law [65 ILCS 5/11-8-11-2.3], in addition to any other tax that may be imposed, a municipality in a county with a population of over 3,000,000 inhabitants may also impose, by ordinance, a tax upon all persons engaged in the municipality in the business of selling motor fuel, as defined in the Motor Fuel Tax Law, at retail for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways. The tax may be imposed, in one cent increments, at a rate not to exceed \$0.03 per gallon of motor fuel sold at retail within the municipality for the purpose of use or consumption and not for the purpose of resale. The tax may not be imposed under this Section on aviation fuel, as defined in Section 3 of the Retailers' Occupation Tax Act. The Municipal Motor Fuel Tax imposed under the Municipal Motor Fuel Tax Law is an occupation tax upon retailers of motor fuel and is administered by the Illinois Department of Revenue ("Department") in the same manner as the Retailers' Occupation Tax. The tax imposed by a municipality under the Municipal Motor Fuel Tax Law and this Part, and all civil penalties that may be assessed as an incident thereof, shall be collected and enforced by the Department.
- b) **Passing on the Tax**
The legal incidence of the Municipal Motor Fuel Tax Law is on the seller. The General Assembly has authorized persons subject to any tax imposed pursuant to the authority

granted in the Municipal Motor Fuel Tax Law to *reimburse themselves for their Municipal Motor Fuel Tax liability by separately stating such tax as an additional charge, which charge may be stated in combination, in a single amount, with State tax which sellers are required to collect under the Use Tax Act [35 ILCS 105], pursuant to such bracket schedules as the Department has prescribed (see 86 Ill. Adm. Code 150. Table A).*

c) Exclusion from "Gross Receipts"

Any amount added to the selling price of motor fuel by the seller because of a Municipal Motor Fuel Tax shall not be regarded as a part of the seller's gross receipts that are subject to Illinois Retailers' Occupation Tax [35 ILCS 120] or any local occupation tax administered by the Department.

Section 696.105 Registration and Returns

a) Separate Registration Not Required

A retailer's registration under the Illinois Retailers' Occupation Tax Act [35 ILCS 120] is sufficient for the Municipal Motor Fuel Tax Law. No special registration for the Municipal Motor Fuel Tax Law is required.

b) Requirements as to Returns

- 1) The information required for the Municipal Motor Fuel Tax Law shall be furnished on the return form prescribed by the Department.
- 2) On or before the twentieth day of each calendar month, every person engaged in the business of selling motor fuel, as now or hereafter defined in the Motor Fuel Tax Law [35 ILCS 505], at retail in a municipality in Cook County that has adopted an ordinance imposing the tax under this Part for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways during the preceding calendar month shall file a return with the Department for such preceding month, stating the name of the seller; the seller's address; the address of the principal place of business (if that is a different address) from which he or she is engaged in the business of selling such motor fuel at retail; total gallons of motor fuel sold; deductions allowed by law; and amount of tax due.
- 3) If the retailer files his Illinois Retailers' Occupation Tax returns on the gross receipts basis, he or she must report Municipal Motor Fuel Tax information in his or her returns on the same basis. If the retailer files his or her Illinois Retailers' Occupation Tax returns on the gross sales basis, he or she must report Municipal Motor Fuel Tax information in his or her returns on the gross sales basis.

Section 696.110 Claims to Recover Erroneously Paid Tax

Claims for Multiple Taxes. If a claimant files a claim for refund on a transaction which was subject to State and local taxes administered by the Department, the claim need not be filed separately for each type of tax. A single claim for the total of all applicable taxes will suffice. The claim will be audited, heard, or otherwise processed as a single claim whenever possible. A single credit memorandum will be issued that may be used by the claimant or his authorized assignee to pay State or local tax liability as authorized in 86 Ill. Adm. Code 130.1505(b)(1).

Section 696.115 Jurisdictional Questions

a) Definitions

When used in this Part, "municipality" includes all territory located within the municipality, and refers to all cities, villages or incorporated towns, including an incorporated town that has superseded a civil township, that are in Cook County and, therefore, authorized under the Municipal Motor Fuel Tax Law [65 ILCS 5/8-11-2.3] to impose a Municipal Motor Fuel Tax.

When used in this Part, "selling activities" refers to those activities that comprise "an occupation, the business of which is to sell tangible personal property at retail". "Selling activities" includes "the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price". *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943).

b) Retailer's Selling Activities Determine Taxing Jurisdiction

- 1) **Occupation of Selling.** The Municipal Motor Fuel Tax Law authorizes the corporate authorities of a municipality in Cook County to impose a tax on those engaged in the municipality in the business of selling motor fuel at retail within the municipality. Because the statute imposes a tax on the retail business of selling, and not on specific sales, the jurisdiction in which the sale takes place is not necessarily the jurisdiction where the Municipal Motor Fuel Tax is owed. Rather, it is the jurisdiction where the seller is engaged in the business of selling that can impose the tax. *Automatic Voting Mchs. v. Daley*, 409 Ill. 438, 447 (1951) ("In short, the tax is imposed on the "occupation" of the retailer and not upon the "sales" as such.") (citing *Mahon v. Nudelman*, 377 Ill. 331 (1941) and *Standard Oil Co. v. Dep't of Finance*, 383 Ill. 136 (1943)); see also *Young v. Hulman*, 39 Ill. 2d 219, 225 (1968) ("the retailers occupational tax . . . imposes liability upon the occupation of selling at retail and not on the sale itself").
- 2) **Composite of Selling Activities.** The occupation of selling is comprised of "the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price". *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943). Thus, establishing where "the taxable business of selling is being carried on" requires a fact-specific inquiry into the composite of activities that comprise the retailer's business. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, paragraph 32 (citing *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321-22 (1943)).
- 3) **Multijurisdictional Retailers.** Some retailers are engaged in retail operations with selling activities in multiple jurisdictions within the State, or in jurisdictions located in more than one state. The selling activities that comprise these businesses "are as varied as the methods which men select to carry on retail business". *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 321 (1943). Consequently, "it is... not possible to prescribe by definition which of the many activities must take place in [a jurisdiction] to constitute it an occupation conducted in [that jurisdiction]... [I]t is necessary to determine each case according to the facts which reveal the method by which the business was conducted". *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316,

321-22 (1943); see also *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, paragraph 36.

- 4) **Statutory Intent.** It is the intent of the Municipal Motor Fuel Tax Law that retailers will incur Municipal Motor Fuel Tax in a jurisdiction in Illinois if they "enjoyed the greater part of governmental [services and] protection" in that jurisdiction. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, paragraph 34 (quoting *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 197 (1942)). By allowing municipalities in Cook County to impose tax on retailers who conduct business in the municipality, the Municipal Motor Fuel Tax Law links the retailer's tax liability to where it principally enjoys the benefits of government services. *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 199 (1942).
- 5) **Determination of Taxing Jurisdiction.** Applying the provisions in subsections (b)(1) and (b)(4), a seller incurs Municipal Motor Fuel Tax in the municipality if its predominant and most important selling activities take place in the municipality. Isolated or limited business activities within a jurisdiction do not constitute engaging in the business of selling in that jurisdiction when other more significant selling activities occur outside the jurisdiction, and the business predominantly takes advantage of government services provided by other jurisdictions. *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316, 322-23 (1943); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, paragraphs 30 through 35.
- 6) **Substance over Form.** The Department "may look through the form of a putatively [multijurisdictional] transaction to its substance" to determine where "enough of the business of selling took place" and, thus, where the seller is subject to local retailers' occupation tax. *Marshall & Huschart Mach. Co. v. Dep't of Revenue*, 18 Ill. 2d 496, 501 (1960); *Fed. Bryant Mach. Co. v. Dep't of Revenue*, 41 Ill. 2d 64, 67 (1968); *Int'l-Stanley Corp. v. Dep't of Revenue*, 40 Ill. App. 3d 397, 406 (1st Dist. 1976); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, paragraph 31. For example, the Department will not look to the location of a party that is owned by or has common ownership with a supplier or a purchaser if that party does not, in substance, conduct the selling activities related to the sales.
- 7) **Same Standard Applies to Intrastate and Interstate Retailers.** For purposes of determining where a retailer is engaged in the business of selling, it does not matter whether the retailer is engaged in selling activities in taxing jurisdictions in multiple states, or in multiple jurisdictions in this State. The legal standard is the same. The retailer is engaged in the business of selling in the taxing jurisdiction where its predominant and most important selling activities take place. *Ex-Cell-O Corp. v. McKibbin*, 383 Ill. 316 (1943); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, paragraph 30 ("the location of the business of selling inside or outside the [S]tate controls..."). If a retailer engages in some selling activities in a taxing jurisdiction in this State, but that retailer's predominant selling activities are outside the State, the retailer's obligation to collect and remit taxes on Illinois sales is governed by the Illinois Use Tax Act [35 ILCS 105/2] (defining "retailer maintaining a place of business in the State"); *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, paragraph 31 ("some combination of activities within the [S]tate are insufficient for the retail occupation tax to apply") (citing *Automatic Voting Machs. v. Daley*, 409 Ill. 438, 447 (1951)).

- 8) Because it is not practicable for retailers to divide Municipal Motor Fuel Tax among competing jurisdictions, a retailer subject to the Municipal Motor Fuel Tax is engaged in the business of selling in only one location in Illinois for each sale.
- c) Application of Composite of Selling Activities Test to Retailers Conducting Selling Activities in Multiple Taxing Jurisdictions. Every retailer maintaining a place of business in this State shall determine the taxing jurisdictions in which it is engaged in the business of selling with respect to each of its sales by applying the standards set forth in this subsection (c), except when a retailer is engaged in particular selling activities identified by a statute that specifies the taxing jurisdiction where retailers engaged in those activities shall remit Municipal Motor Fuel Tax. These retailers shall remit Municipal Motor Fuel Tax as directed by statute, notwithstanding anything in this Part to the contrary.
- 1) Primary Selling Activities. Without attempting to anticipate every kind of fact situation that may arise, taxpayers that divide selling activities among personnel located in multiple jurisdictions shall consider the following selling activities to determine where they are engaged in the business of selling with respect to each sale. A retailer is engaged in the business of selling in only one location for each sale, but may be engaged in the business of selling in different locations for different sales:
 - A) Location of sales personnel exercising discretion and authority to solicit customers on behalf of a seller and to bind the seller to the sale;
 - B) Location where the seller takes action that binds it to the sale, which may be acceptance of purchase orders, submission of offers subject to unilateral acceptance by the buyer, or other actions that bind the seller to that sale;
 - C) The location where payment is tendered and received, or from which invoices are issued with respect to each sale;
 - D) Location of inventory if tangible personal property that is sold is in the retailer's inventory at the time of its sale or delivery, and
 - E) The location of the retailer's headquarters, which is the principal place from which the business of selling tangible personal property is directed or managed. In general, this is the place at which the offices of the principal executives are located. When executive authority is located in multiple jurisdictions, the place of daily operational decision making is the headquarters.
 - 2) A retailer engaging in three or more primary selling activities in one location in the State for a particular sale shall remit the Municipal Motor Fuel Tax imposed by the taxing bodies with authority to impose Municipal Motor Fuel Tax on those engaged in the business of selling in that location for that sale. A retailer engaging in three or more primary selling activities for a particular sale outside the State shall collect and remit tax to the State to the extent required by the Illinois Use Tax Act [35 ILCS 105] for that sale, except as provided in subsection (d).
 - 3) Application of Primary Selling Activities to Common Selling Operations. Retailers engaged in selling operations with a single location where the primary selling activities predominate constitute the vast majority of retailers in the State.

Subsections (c)(3)(A) and (c)(3)(B) apply the primary selling activities to certain common selling operations and identify the location where the Department will presume the seller is engaged in the business of selling with respect to each sale.

- A) Over the Counter Sales. If a purchaser is present at a place of business owned or leased by a retailer and there enters into an agreement with the retailer's sales personnel to purchase tangible personal property, and makes payment for that property at the same place of business, then the Municipal Motor Fuel Tax for that sale is incurred at the retailer's place of business where the sale occurred regardless of whether the purchaser takes immediate possession of the tangible personal property, or the retailer delivers or arranges for the property to be delivered to the purchaser.
 - B) Sales from Vehicles Carrying Uncommitted Stock of Goods. The seller's place of engaging in business when making sales and deliveries (not just deliveries pursuant to previously completed sales, but actual sales and deliveries) from a vehicle in which a stock of goods is being carried for sale is the place at which the sales and deliveries actually are made. The vehicle carrying the stock of goods for sale is regarded as a portable place of business.
- 4) Secondary Selling Activities. If the primary selling activities listed in subsection (c)(1) occur in multiple jurisdictions, but no individual jurisdiction has more than two primary selling activities, the following additional selling activities shall be considered to determine the jurisdiction in which the retailer is engaged in the business of selling.
- A) Location where marketing and solicitation occur;
 - B) Location where the seller engages in activities necessary to procure goods for sale;
 - C) Location of the retailer's officers, executives or employees with authority to set prices or determine other terms of sale if determinations are made in a location different than that identified in subsection (c)(1)(A);
 - D) Location where purchase orders or other contractual documents are received when purchase orders are accepted, processed, or fulfilled in a location or locations different from where they are received;
 - E) Location where title passes; and
 - F) Location where the retailer displays goods to prospective customers, such as a showroom.
- 5) Except as provided in subsection (d), a retailer that is not engaged in the business of selling in a jurisdiction under subsection (c)(2) is engaged in the business of selling in the jurisdiction where its inventory is located under subsection (c)(1)(D), or where its headquarters is located under subsection (c)(1)(E), whichever jurisdiction is the location where more selling activities occur, considering both primary and secondary selling activities.

- 6) A retailer that is not engaged in the business of selling in a jurisdiction under subsection (c)(2) or (c)(5) is presumed to be engaged in the business of selling at the location of its headquarters absent clear and convincing evidence to the contrary.
- d) Presumptions Applying to Certain Selling Operations
- 1) For certain classes of retailers with unique, complicated or widely dispersed selling activities, determining appropriate tax situs in every situation presents substantial administrative difficulties for both retailers and tax enforcement personnel. Subsection (d)(2) provides an administrative "short cut" that balances the administrative difficulties presented by certain selling operations against the need for accurate tax assessment.
 - 2) In-State Inventory/Out of State Selling Activity. If a retailer's selling activities take place in taxing jurisdictions outside this State, except that the tangible personal property that is sold is in an inventory in the possession of the retailer located within a jurisdiction in Illinois at the time of its sale (or is subsequently produced by the retailer in the jurisdiction), then delivered in Illinois to the purchaser, the jurisdiction where the property is located at the time of the sale or when it is subsequently produced by the retailer will determine where the retailer is engaged in business with respect to that sale. *Chemed Corp., Inc. v. Department of Revenue*, 186 Ill. App. 3d 402 (4th Dist. 1989).
- e) Examples
- 1) A customer makes a purchase of gasoline at a retail gasoline station located in a municipality that has imposed a Municipal Motor Fuel Tax. The sale is deemed to be an over the counter sale sourced to the location of the gas station. Municipal Motor Fuel Tax applies.
 - 2) A motor fuel retailer's business model consists of selling motor fuel at retail and delivering it in bulk to commercial customers. Municipality A does not impose a Municipal Motor Fuel Tax. Municipality B imposes a Municipal Motor Fuel Tax. Primary Selling Activities in municipality A: the motor fuel retailer's headquarters are located in municipality A; the motor fuel retailer receives payment at and issues invoices from municipality A; and the motor fuel retailer accepts purchase orders that bind it to the sale in municipality A. Primary Selling Activities in municipality B: the motor fuel retailer delivers fuel to a customer in municipality B and the motor fuel retailer's inventory is located in municipality B. The sale is deemed to take place in Municipality A because 3 of the 5 primary selling activities listed in subsection (c)(1) are met. No Municipal Motor Fuel Tax is imposed because municipality A does not impose a Municipal Motor Fuel Tax.

Section 696.120 Incorporation of Retailers' Occupation Tax Regulations by Reference

To avoid needless repetition, the substance and provisions of all Retailers' Occupation Tax Regulations (86 Ill. Adm. Code 130) that are not incompatible with the Municipal Motor Fuel Tax Law or any special regulations that may be promulgated by the Department under the Law shall apply to the tax imposed pursuant to this Part.

Section 695.125 Penalties, Interest and Procedures

All penalties (both civil and criminal), provisions concerning interest, and procedures (such as the making of assessments, the venue and mode of conducting hearings, subpoenas, matters pertaining to judicial review and other procedural subjects), together with statutes of limitation, are the same under the Municipal Motor Fuel Tax Law as under the Illinois Retailers' Occupation Tax Act [35 ILCS 120] and the Uniform Penalty and Interest Act [35 ILCS 735].

Section 696.130 Effective Date

- a) *An ordinance or resolution imposing or discontinuing the Municipal Motor Fuel Tax or effecting a change in the rate thereof shall either: (i) be adopted and a certified copy thereof filed with the Department on or before the first day of April, whereupon the Department shall proceed to administer and enforce this Part as of the first day of July next following the adoption and filing; or (ii) be adopted and a certified copy thereof filed with the Department on or before the first day of October, whereupon the Department shall proceed to administer and enforce this Part as of the first day of January next following the adoption and filing. (Section 8-11-2.3 of the Law)*
- b) *An ordinance adopted in accordance with the provisions of Section 8-11-2.3 of the Illinois Municipal Code in effect under P.A. 101-32 shall be deemed to impose the tax in accordance with the provisions of Section 8-11-2.3 as amended by P.A. 101-604 and shall be administered by the Department of Revenue in accordance with the provisions of Section 8-11-2.3 as amended by P.A. 101-604; provided that, on or before October 1, 2020, the municipality adopts and files a certified copy of a superseding ordinance that imposes the tax in accordance with the provisions of Section 8-11-2.3 of the Illinois Municipal Code as amended by P.A. 101-604. If a superseding ordinance is not so adopted and filed, then the tax shall be discontinued on January 1, 2021. P.A. 101-32, effective June 28, 2019, authorized municipalities in Cook County to impose a motor fuel tax in a way that more closely follows the manner in which State Motor Fuel Tax is imposed (i.e. collected at the wholesale level). P.A. 101-604, effective December 13, 2019, amended this provision to instead authorize municipalities in Cook County to impose a tax on the retail sale of motor fuel (in the same manner as the County Motor Fuel Tax is imposed (see 86 Ill. Adm. 695.101 et seq.)). In the interests of a smooth implementation of the tax, the Municipal Motor Fuel Tax Law deems municipal motor fuel tax ordinances adopted under the P.A. 101-32 wholesale structure to meet the P.A. 101-604 retail structure to allow for implementation on July 1, 2020. If, however, the municipality does not thereafter adopt and file a superseding ordinance that imposes the tax in accordance with the Municipal Motor Fuel Tax Law as amended by P.A. 101-604 on or before October 1, 2020, then the Department shall discontinue collection of the tax on January 1, 2021.*
- c) For purposes of determining which tax rate applies, the date of the sale is deemed to be the date of the delivery of the property.